IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

WV DIVISION OF HIGHWAYS,

Petitioner,

and

Case No.: _____
JCN: 2019015684
CCN: 2019002166
DLE: 11-02-2017

LARRY D. SCOTT,

Respondent.

BRIEF OF PETITIONER WV DIVISION OF HIGHWAYS

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ASSIGNMENT OF ERROR

This workers' compensation claim is in litigation pursuant to the Respondent's protest to the claim administrator's order of March 29, 2019, which rejected the claimant's application for workers' compensation benefits related to a diagnosis of undifferentiated pleomorphic sarcoma. By order dated August 29, 2022, the Workers' Compensation Board of Review erroneously reversed the claim administrator's order and ruled this claim to be compensable.

The Petitioner alleges that the Workers' Compensation Board of Review committed clear error in failing to address industrial hygiene data of the Respondent's radiation exposure in making its determination as to compensability. Moreover, the Workers' Compensation Board of Review failed to make any specific findings of fact as to the reliability and probative value of scientific evidence presented by both parties to the underlying protest.

STATEMENT OF THE CASE

Mr. Scott was a 46-year old transportation engineering technician with the Division of Highways when he filed this workers' compensation claim. Mr. Scott initially sought medical treatment for a tumor in his right leg from Dr. Walter Boardwine in Elkins in late 2017. Testing indicated that the tumor was malignant, and Mr. Scott came under the care of a Dr. William Grosh in Charlottesville, Virginia. Dr. Grosh is an oncologist. Dr. Grosh diagnosed Mr. Scott with undifferentiated pleomorphic sarcoma (UPS).

Mr. Scott filed this claim alleging that his cancer had been caused by Mr. Scott's exposure to radioactive materials contained in a moisture sensor that Mr. Scott regularly used at work. The initial claim filing did not include any medical statement in support of this allegation. The claim administrator denied the claim based on a lack of medical evidence establishing a basis for the claim.

Mr. Scott retained legal counsel and filed an administrative protest to the rejection of his workers' compensation claim.

In support of his administrative protest, Mr. Scott testified at deposition on July 2, 2019. Mr. Scott's right leg had been amputated above the knee approximately 10 days earlier. Mr. Scott had developed tumors in his groin and abdomen. These tumors had been treated with radiation. The radiation made the tumors susceptible to significant bleeding, and Mr. Scott had been hospitalized for several days following the amputation. Dr. Grosh had informed Mr. Scott that his condition was terminal.

Mr. Scott testified that he grew up in Barbour County, graduating from Philip Barbour High School in 1991. He did not undergo any education or training beyond high school. Mr. Scott married and had two children who are now adults. Following high school, Mr. Scott had entered the workforce with Bruce Hardwoods as a material handler for approximately eight years. He then worked as a guard for the Department of Corrections for approximately nine years. He then worked at the Elkins office of the Division of Highways for approximately 10 years. He worked for the Division of Highways as an inspector of asphalt, concrete, and

compaction. He primarily worked along Corridor H in Grant and Tucker Counties. He described the work sites as large-scale road construction jobs.

In the course of his work as an inspector, he came to use a moisture gauge that he referred to as the "nuclear gauge." Mr. Scott reported that this device was used to measure moisture levels in various substances. The device would be carried to various locations where it was then set up to take measurements. He would typically remove the device from the van that he traveled in and carry it by hand to various locations on a particular jobsite. Mr. Scott would then use the device to make measurements. Mr. Scott reported that he typically carried the device by its handle in his right hand. The device extended down toward the ground, with the operational end being carried between his right knee and ankle. He would set the device up for use by placing it on the ground. He reports that he would input certain information into the device and then collect data from a screen on the device. He would sometimes kneel beside the device when it was operating.

In terms of training on the use of the device, Mr. Scott stated that he knew that the device had components that emitted radiation. He described the training that he received on the safe use of the device as "time and distance" training. He explained that the "time and distance" training meant that the radiation from the device would not be harmful if it did not occur over a sustained period of time and if he maintained safe distance from the device so as not to be exposed to excessive radiation. He reported using the gauge regularly for approximately five of the 10 years that he worked at the Division of Highways. During those five years, he reports regularly using the device for nine months per year. During those nine months per year, Mr. Scott reported working shifts of 8-12 hours per day, depending on the weather. Mr. Scott stated that the Division of Highways required him to wear a badge to monitor his radiation exposure. He was instructed to wear the badge between his waist and shoulders, but he believes his most regular exposure to radiation would have been from carrying and using the device around his legs.

Mr. Scott testified that he had noticed a bump on his right leg about two years earlier. He consulted with his family physician who referred him to Dr. Broadwine. Dr. Broadwine had the bump tested and found that it was malignant. Dr. Broadwine referred the claimant to the University of Virginia where Mr. Scott came under the care of Dr. Grosh. Dr. Grosh treated the claimant for the cancer that developed in the right leg, ultimately resulting in amputation of the right leg above the knee.

Mr. Scott passed away on August 12, 2019.

In conjunction with this workers' compensation claim, Dr. Grosh produced a brief written statement in which he asserted that Mr. Scott's cancer was most likely caused by his use of the nuclear moisture gauge during his employment. This statement did not take into consideration any of the exposure data collected and stored by the Division of Highways regarding Mr. Scott's radiation exposure.

The employer subsequently referred records related to Mr. Scott's radiation exposure and medical records for review by Dr. Dave Randolph. Dr. Randolph previously served as a medical doctor and officer in the United States Navy. Dr. Randolph holds a medical degree with board-certification in occupational medicine and a doctoral degree in epidemiology. The employer requested that Dr. Randolph conduct an epidemiological review of this claim and offer an opinion as to whether radiation exposure likely caused Mr. Scott's UPS.

Dr. Randolph researched the radiation exposure alleged by Mr. Scott and, specifically, cases related to the Troxler nuclear gauge that Mr. Scott identified as the source of his exposure. Dr. Randolph was unable to identify any peer-reviewed medical studies linking the type of device used by Mr. Scott to similar cancer cases. Dr. Randolph was particularly interested in the radiation exposure data maintained by the Division of Highways. Dr. Randolph analyzed Mr. Scott's claim through the use of the Bradford-Hill criteria, an epidemiological assessment system. This data showed minimal radiation exposure to Mr. Scott over the course of his career at the Division of Highways. Dr. Randolph concluded that Mr. Scott's claim failed to

satisfy the epidemiological causation standard when the Bradford-Hill criteria were applied to the data.

With the initial findings provided by Dr. Randolph, the Division of Highways sought additional information from its own Radiation Safety Officer, Daniel Brayack. Mr. Brayack is a professional engineer. Mr. Brayack is the custodian of the radiation exposure data for Division of Highways employees, and he provided radiation exposure data specific to Mr. Scott. Mr. Brayack testified through affidavit that he observed Mr. Scott regularly observing radiation exposure protocols and obtained regular testing of Mr. Scott's dosimetry devices to ensure that Mr. Scott was not subjected to radiation exposure above federally-mandated levels. Mr. Brayack testified that Mr. Scott's dosimetry badges were regularly tested in accordance with regulations set by the Nuclear Regulatory Commission. Mr. Brayack's review of Mr. Scott's exposure data showed a total exposure of 28 millirems of radiation between 2011 and 2018. The Nuclear Regulatory Commission sets an annual exposure limit of 5,000 millrems.

Following the introduction of Dr. Randolph's initial report and Mr. Brayack's affidavit, Greg Quattro, a co-worker of Mr. Scott at Division of Highways, testified at deposition. Mr. Quattro testified that he assisted Mr. Scott in making a short video that showed a survey meter indicating that the nuclear gauge did, indeed, produce radiation.

Claimant's counsel then introduced a written report from a medical physicist named Michael S. Gossman. Mr. Gossman is a medical physicist in Indiana; he does not purport to hold a terminal degree in any health or environmental science. Mr. Gossman concluded that the actual radiation dosimetry readings from the Division of Highways are unreliable and that Mr. Scott sustained radiation exposure at a level several thousand times higher than that allowable under federal regulation. Mr. Gossman believed that Mr. Scott's radiation exposure likely caused him to develop UPS. Mr. Gossman based his conclusion on what he believed to be Mr. Scott's radiation exposure, not the data of Mr. Scott's actual radiation exposure.

In response to Mr. Gossman's report, the Division of Highways asked that this claim be reviewed by P. Andrew Karam, Ph.D. Dr. Karam holds a doctoral degree in

environmental sciences that he obtained after working in nuclear propulsion as an officer in the United States Navy. He teaches radiation safety, is a published author on the subject of radiation safety, and has previously qualified as an expert on radiation in federal court. Dr. Karam reviewed the exposure data related to Mr. Scott, the manufacturer's specifications on the nuclear gauge, Mr. Scott's medical records, and the various reports from Dr. Boardwine, Dr. Grosh, Dr. Randolph, and Mr. Gossman. In an extensive written report, Dr. Karam set forth his findings as to the likely radiation exposure sustained by Mr. Scott. He also considered the far more extravagant opinions of Mr. Gossman, and Dr. Karam unequivocally concluded that it was unlikely that Mr. Scott developed UPS as a result of radiation exposure. Of particular interest, Dr. Karam utilized an assessment tool utilized in claims arising under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA). EEOICPA compensates energy workers for illnesses contracted as a result of radiation exposure. Dr. Karam analyzed Mr. Scott's claim with the tools used to compensate workers through EEOICPA and concluded that Mr. Scott's claim fell below the "more likely than not" standard used in EEOICPA claims.

The Workers' Compensation Board of Review subsequently reversed the claim administrator's order by decision dated August 29, 2022. Administrative Law Judge Sarah N. Hall identified approximately 50 pieces of evidence submitted in the underlying protest and summarized that evidence. In support of its case, the employer submitted extensive reports from Dr. Karam and Dr. Randolph. Judge Hall summarized each report in one paragraph. In the "Discussion" portion of the underlying decision, Judge Hall did not address the actual dosimetry data addressing Mr. Scott's radiation exposure while at work. With regard to the expert opinions on record, she stated that she found the opinions of Dr. Karam and Dr. Randolph to be unpersuasive without an explanation as to why she found Dr. Karam and Dr. Randolph to be unpersuasive when they are to two most highly-qualified experts on causation to offer opinions in this matter. Instead, Judge Hall described at length the findings of Mr. Gossman, a witness who created his own data set regarding Mr. Scott's radiation exposure.

SUMMARY OF ARGUMENT

Dosimetry data regarding Mr. Scott's radiation exposure establishes that he was not exposed to radiation in excess of federally regulated limits. Moreover, the reasoned scientific opinions of Dr. Randolph and Dr. Karam find that there is no causation between Mr. Scott's limited radiation exposure and his development of undifferentiated pleomorphic sarcoma. As the underlying decision of the Administrative Law Judge ignores both the actual exposure data and the reasoned scientific opinions, it should be reversed.

STATEMENT REGARDING ORAL ARGUMENT

The Petitioner, WV Division of Highways, believes that oral argument would enhance the Intermediate Court of Appeals' understanding of the issues presented in this appeal.

ARGUMENT

A. The underlying decision of the Administrative Law Judge is in violation of statutory provisions regarding the compensability of occupational diseases and is clearly wrong in view of the reliable, probative, and substantial evidence of the whole record.

The Workers' Compensation Board of Review committed reversible error in the underlying decision. Pursuant to W. VA. CODE § 23-5-12, the Intermediate Court of Appeals may reverse the decision of the Workers' Compensation Board of Review if the Petitioner shows that the decision of the Workers' Compensation Board of Review is:

> (1) In violation of statutory provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the administrative law judge; or
>
> (3) Made upon unlawful procedures; or
>
> (4) Affected by other error of law; or
>
> (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
>
> (6) Arbitrary capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The Workers' Compensation Board of Review's decision in the underlying protest is affected by misapplication of the statutory standard for compensability of an occupational disease. Additionally, the underlying decision is clearly wrong in view of the reliable, probative, and substantial evidence presented in this matter.

Accordingly, the underlying decision should be reversed, and the claim administrator's rejection of this claim should be reinstated.

B. The Administrative Law Judge erroneously concluded that Mr. Scott's UPS was causally connected to his employment activities with the WV Division of Highways.

The claimant's UPS fails to meet the standards of compensability for an occupational disease under the West Virginia Workers' Compensation Act. W. VA. CODE § 23-4-1(f) defines workers' compensation coverage for occupational diseases. This section provides six criteria that must be met to establish coverage of an occupational disease under the Act:

> (1) That there is a direct causal connection between the conditions under which work is performed and the occupational disease;
>
> (2) That it can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;
>
> (3) That it can be fairly traced to the employment as the proximate cause;
>
> (4) That it does not come from a hazard to which workmen would have been equally exposed outside of the employment;
>
> (5) That it is incidental to the character of the business and not independent of the relation of employer and employee; and
>
> (6) That it appears to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction.

The claimant's UPS does not satisfy the six criteria of an occupational disease. Specifically, the evidence on record fails to establish a causal connection between the claimant's UPS and the claimant's radiation exposure during his employment.

The claimant bears the burden of proof in establishing a claim for occupational disease. *See Clark v. State Workmen's Compensation Commissioner*, 155 W. Va. 276, 187 S.E.2d 213 (1972), and *Devericks v. State Compensation Director*, 150 W. Va. 145, 144 S.E.2d 498 (1965). In order to establish a valid claim for occupational disease, a claimant must show by

competent evidence that a "causal connection" between the disability and the work-related injury exists. *Id*. When proof of causation offered by a claimant is based on speculation, such proof is inadequate to sustain a claim. *Id*. In this instance, the requisite causal connection between the claimant's UPS and the claimant's employment does not exist because the claim is based on speculation.

Both the claimant and the claimant's expert witnesses assume the claimant's condition arose because of radiation exposure at work, but that notion is dispelled by dosimetry data collected throughout the claimant's employment with the WV Division of Highways. Vague allegations of exposure are not sufficient to establish a compensable claim. In *Hudson v. State Workers' Compensation Commissioner*, 162 W. Va. 513, 256 S.E.2d 864 (1979), the Supreme Court of Appeals affirmed the Workers' Compensation Appeal Board's rejection of an occupational disease claim wherein the claimant, although alleging constant "exposure" to toxic fumes, failed to introduce sufficient evidence demonstrating a causal connection between the exposure and the disease. Here, Mr. Scott alleges that he was exposed to radiation through the use of a nuclear moisture gauge. These allegations are directly at odds with data recorded under government-mandated exposure testing, the manufacturer's data regarding radiation emission from the nuclear moisture gauge, and Mr. Scott's own observations as a safety officer during his employment with the WV Division of Highways. The objective data on record clearly establishes that Mr. Scott was not exposed to radiation in excess of federal exposure limits, thus any claim that he was exposed to a greater level of radiation or a harmful level of radiation is merely speculative.

In examining the potential causation of Mr. Scott's UPS, Dr. Karam utilized a causation analysis tool used to evaluate the claims of nuclear energy workers under EEOICPA. The National Institutes of Occupational Safety and Health (NIOSH) are charged with evaluating the causation of radiation-related illness claims asserted by energy workers. 42 U.S.C. § 81. In evaluating radiation exposure claims, NIOSH assigns the greatest weight to actual evidence of radiation exposure. *See* at *Id.* at § 82.2(a). The claimant's dose is then assessed against the

nature of the claimant's illness and other personal data to determine a likelihood that radiation exposure caused the claimant's illness. *See* at *Id.* at § 82.4. Dr. Karam performed this exact process with regard to Mr. Scott. He unequivocally concluded that Mr. Scott's claim would not satisfy the "more likely than not" standard used in EEOICPA claims. While application of the EEOICPA analysis is not required under the West Virginia Workers' Compensation Act, it is analogous to the inquiry that must be made to determine compensability. The EEOICPA framework relies on the current state of scientific knowledge regarding radiation and UPS and is applied under a "more likely than not" standard similar to the preponderance of evidence standard found in the West Virginia Workers' Compensation Act.

Likewise, Mr. Scott's claim does not withstand epidemiological scrutiny. Dr. Randolph analyzed Mr. Scott's claim through the use of the Bradford-Hill criteria, a scientific system of assessment designed to identify causal relationships between exposure and illness. Dr. Randolph thoroughly reviewed the exposure data related to Mr. Scott and data from the manufacturer of the nuclear moisture gauge. Dr. Randolph concluded that Mr. Scott's claim failed to satisfy the Bradford-Hill criteria.

Under the EEOICPA standard used by Dr. Karam or the Bradford-Hill criteria used by Dr. Randolph, Mr. Scott's claim failed to establish a causal connection between his UPS and his occupational exposure to radiation. The Administrative Law Judge did not address Dr. Karam's analysis or the EEOICPA standard or Dr. Randolph's Bradford-Hill analysis in her discussion of this claim. Under the standards set forth in W. VA. CODE § 23-4-1(f), there is insufficient evidence to establish that Mr. Scott developed UPS as a result of his work activities with the Division of Highways. His claim for benefits, therefore, should have remained denied.

C. The Administrative Law Judge failed to address dosimetry data collected while Mr. Scott worked for the Division of Highways that established his exposure was far below federally-mandated exposure limits.

The WV Division of Highways monitors radiation exposure to its employees working with nuclear moisture gauges because it is federally mandated to do so. The radioactive materials contained in the nuclear moisture gauge are highly regulated, and individuals using devices containing those materials must be routinely monitored with approved dosimetry devices. Data from the WV Division of Highways regarding Mr. Scott's possession and use of the nuclear moisture gauges and his dosimetry badge readings are in the evidentiary record. The dosimetry readings for Mr. Scott show that his radiation exposure was consistently below the permissible exposure limit set by the Nuclear Regulatory Commission. In total, Mr. Scott showed 28 millirems of radiation exposure between 2011 and 2018, in comparison to the annual exposure limit of 5,000 millirems set by the Nuclear Regulatory Commission.

While the West Virginia Workers' Compensation Act does not directly address radiation exposure, it does acknowledge that federal agencies set permissible exposure limits on certain hazards in the workplace. In certain areas, such as respirable dust, the Act creates a presumption that workers are not subject to harmful exposure when permissible exposure limits are not exceeded. *See, e.g.*, W. VA. C.S.R. § 85-20-52.2 (finding that employers may establish compliance with OSHA and/or MSHA respirable dust exposure limits as a defense to claims of occupational pneumoconiosis). The WV Division of Highways' dosimetry data establishes that Mr. Scott was not exposed to radiation levels above limits set by the Nuclear Regulatory Commission. The WV Division of Highways employs a Radiation Safety Officer to obtain, review, and maintain this information. The Radiation Safety Officer testified in this matter that

dosimetry testing established that Mr. Scott was not exposed to radiation in excess of federal standards.

The objective data from Mr. Scott's dosimeters was used prominently in the written reports of Dr. Karam and Dr. Randolph. As noted by both experts, the actual data collected by the dosimeters worn by Mr. Scott is the best and most reliable indicator of his radiation exposure. In contrast, Dr. Grosh admitted that he never reviewed this data in forming his opinion as to causation. Mr. Gossman dismissed the dosimetry data and formed his own version of exposure data through conjecture. Such steps were unnecessary to undertake when the exposure data is readily available from reliable dosimeters kept in accordance with federal regulations.

The manufacturer of the nuclear moisture gauge, Troxler, publishes an extensive manual regarding the safe operation and storage of the device. That manual identifies the radioactive materials within the device and the expected radiation exposure to individuals operating or transporting the device. That manual indicates that a very low level of radiation is expected to escape the device. In fact, the device is built in a manner that a published incident report found that such a device endured being run over by a bulldozer without experiencing a harmful breach that would permit excessive radiation exposure. Troxler's publication regarding the anticipated radiation exposure from the device is in line with findings of the dosimetry data, further bolstering the credibility of the dosimetry data.

D. The radiation analysis of Dr. Karam and the epidemiological study of Dr. Randolph are in agreement with the dosimetry data and testing of the nuclear moisture gauges used by Mr. Scott during his employment with the WV Division of Highways.

Both Dr. Karam, as a health physicist, and Dr. Randolph, as an epidemiologist, evaluated the dosimetry data, the manufacturer's data, and the testimony in this matter. Both Dr. Randolph and Dr. Karam concluded that it was unlikely that Mr. Scott's UPS was caused by occupational radiation exposure. In *Powell v. State Workers' Compensation Commissioner*, 166 W. Va. 327, 273 S.E.2d 832 (1980), the Supreme Court of Appeals discussed the application of the causation requirements of occupational disease found at W. VA. CODE § 23-4-1. In *Powell*, the Court ruled on a widow's claim for benefits related to her husband's death from asbestos-related lung cancer. In applying W. VA. CODE § 23-4-1, the Court reasoned that the determination of causation in occupational disease claims turns on the "state of current scientific knowledge." In applying what is known of Mr. Scott's actual radiation exposure, the manufacturer's knowledge of the radiation emitted by its nuclear moisture gauge, and the testimony in this matter, both Dr. Karam and Dr. Randolph concluded that no reasonable causal link exists between Mr. Scott's employment and Mr. Scott's UPS.

Dr. Karam and Dr. Randolph relied on clearly delineated scientific assessment tools to reach their conclusions. Dr. Karam's use of the EEOICPA causation analysis and Dr. Randolph's use of the Bradford-Hill causation criteria stand up to scientific scrutiny. These methodologies consider the known exposures and weigh them against the current base of scientific and medical knowledge to arrive at a conclusion as to causation. In contrast, the claimant relied on the opinions of Dr. Grosh and Mr. Gossman that do not withstand scientific scrutiny.

Dr. Grosh served as Mr. Scott's treating physician for UPS. In support of Mr. Scott's workers' compensation claim, Dr. Grosh authored a letter of approximately one-and-one-half pages in which he states that radiation exposure could have caused Mr. Scott's development

of UPS. Dr. Grosh later testified at deposition in this matter. Dr. Grosh admitted at deposition that he never reviewed the radiation exposure data from Mr. Scott's dosimetry badges. He also admitted that Mr. Scott was not tested for a genetic mutation that could have caused his development of UPS—a test that Dr. Grosh further admitted would be considered a standard test today. In the absence of the dosimetry data for review, it is inconceivable that Dr. Grosh could reliably comment on the causation of Mr. Scott's UPS, let alone assign causation to occupational radiation exposure.

Similarly, Mr. Gossman performed a review of this matter in which he reviewed the data collected by the dosimetry badges worn by Mr. Scott, dismissed that data, and instead created his own exposure data. It is not entirely clear why Mr. Gossman dismissed the actual dosimetry data collected during Mr. Scott's employment other than it did not fit the narrative he was attempting to create. Likeswise, Mr. Gossman failed to address the fact that the federal government conducts this type of causation analysis on a regular basis under EEOICPA. Instead, Mr. Gossman created his own data that shows an exposure level far outside of anything indicated by Mr. Scott's dosimetry badges. Dr. Karam addressed this unusual methodology in his own report and showed that the EEOICPA analysis for radiation exposure and illness causation failed to demonstrate a more likely than not relationship in Mr. Scott's case even when using Mr. Gossman's fictitious exposure numbers.

In reviewing the dosimetry data, the exposure standards set by the Nuclear Regulatory Commission, the EEOICPA analysis, and the Bradford-Hill criteria, there is no reliable evidence to establish a causal connection between Mr. Scott's UPS and his occupational exposure to radiation. The Administrative Law Judge clearly erred in dismissing the opinions of Dr. Karam and Dr. Randolph without making specific findings establishing her rationale.

CONCLUSION

The underlying decision of the Administrative Law Judge is afflicted by error both in its application of the statutory standard for compensability of occupational disease and its lack of consideration of dosimetry data measuring the Respondent's radiation exposure at work. These errors are compounded by a disregard for the reasoned scientific opinions of Dr. Karam and Dr. Randolph. Based on these multiple errors, the WV Division of Highways respectfully requests that the Administrative Law Judge's decision be reversed and that the claim administrator's rejection of this claim be reinstated.

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of September, 2022, I served the foregoing "Brief of Petitioner" upon all counsel of record through File and Serve Xpress:

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